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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.
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09/258,553 02/26/99 WEAVER

E P03592US1

HM12/0918

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EXAMINER

EWOLDT, G

ART UNIT

PAPER NUMBER

1644

DATE MAILED: 09/18/01

Please find below and/or attached an Office communication concerning this application or proceeding.

Commissioner of Patents and Trademarks

Advisory Action

Application No.

09/258,553

Applicant(s)

Weaver, E.

Examiner

G. R. Ewoldt

Art Unit

1644

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

THE REPLY FILED Aug 20, 2001 FAILS TO PLACE THIS APPLICATION IN CONDITION FOR ALLOWANCE.

Therefore, further action by the applicant is required to avoid the abandonment of this application. A proper reply to a final rejection under 37 CFR 1.113 may only be either: (1) a timely filed amendment which places the application in condition for allowance; (2) a timely filed Notice of Appeal (with appeal fee); or (3) a timely filed Request for Continued Examination (RCE) in compliance with 37 CFR 1.114.

THE PERIOD FOR REPLY [check only a) or b)]

- a) ☒ The period for reply expires 5 months from the mailing date of the final rejection.
- b) ☐ In view of the early submission of the proposed reply (within two months as set forth in MPEP § 706.07 (f)), the period for reply expires on the mailing date of this Advisory Action, OR continues to run from the mailing date of the final rejection, whichever is later. In no event, however, will the statutory period for the reply expire later than SIX MONTHS from the mailing date of the final rejection.

Extensions of time may be obtained under 37 CFR 1.136(a). The date on which the petition under 37 CFR 1.136(a) and the appropriate extension fee have been filed is the date for purposes of determining the period of extension and the corresponding amount of the fee. The appropriate extension fee under 37 CFR 1.17(a) is calculated from: (1) the expiration date of the shortened statutory period for reply originally set in the final Office action; or (2) as set forth in (b) above, if checked. Any reply received by the Office later than three months after the mailing date of the final rejection, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

1. ☐ A Notice of Appeal was filed on _____. Appellant's Brief must be filed within the period set forth in 37 CFR 1.192(a), or any extension thereof (37 CFR 1.191(d)), to avoid dismissal of the appeal.
2. ☐ The proposed amendment(s) will be entered upon the timely submission of a Notice of Appeal and Appeal Brief with requisite fees.
3. ☐ The proposed amendment(s) will not be entered because:
- (a) ☐ they raise new issues that would require further consideration and/or search. (See NOTE below);
- (b) ☐ they raise the issue of new matter. (See NOTE below);
- (c) ☐ they are not deemed to place the application in better form for appeal by materially reducing or simplifying the issues for appeal; and/or
- (d) ☐ they present additional claims without cancelling a corresponding number of finally rejected claims.

NOTE:

4. ☒ Applicant's reply has overcome the following rejection(s):
Rejections under 102
5. ☐ Newly proposed or amended claim(s) _____ would be allowable if submitted in a separate, timely filed amendment cancelling the non-allowable claim(s).
6. ☒ The a) ☐ affidavit, b) ☐ exhibit, or c) ☒ request for reconsideration has been considered but does NOT place the application in condition for allowance because:
See Attachment
7. ☐ The affidavit or exhibit will NOT be considered because it is not directed SOLELY to issues which were newly raised by the Examiner in the final rejection.
8. ☒ For purposes of Appeal, the status of the claim(s) is as follows (see attached written explanation, if any):
Claim(s) allowed: none
Claim(s) objected to: none
Claim(s) rejected: 10-17, 22, and 23
9. ☐ The proposed drawing correction filed on _____ a) ☐ has b) ☐ has not been approved by the Examiner.
10. ☐ Note the attached Information Disclosure Statement(s) (PTO-1449) Paper No(s). _____.
11. ☐ Other:

DETAILED ACTION

1. In view of Applicant's Amendment and Remarks, filed 8/20/01, only the following rejections remain.

2. Applicant's request for the Withdrawal of Final Rejection is acknowledged. Said request is denied. Applicant's arguments that the Examiner should have "expected" the claims to be amended and thus, the Examiner should withdraw the final rejection are not persuasive. While claims are read (and thus searched) in light of the specification, the search can not reasonably be expected to include every possible limitation that might ultimately be claimed. In the instant case, Applicant's inclusion of new limitations in Paper No. 9, comprising a change from a method of preventing disease to a method of reducing the number of bacteria, said method further comprising administering antibodies to verotoxin, necessitated a new search. A Final Rejection was therefore proper.

2. Claims 10-17 and 22-23 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over U.S. Patent No. 4,096,244 (1978) or U.S. Patent No. 4,623,541 (1986), for the reasons of record as set forth in Paper No. 10, mailed 4/05/01.


Applicant's arguments, filed 8/20/01, have been fully considered but they are not persuasive. Applicant argues that a rejection based on routine optimization is improper. Applicant cites numerous decisions, only one of which considers the concept of optimization. However, in the *In re Antonie* case, the question before the court concerned the size of wastewater treatment tanks and an "obvious to try" rejection. Said case is not relevant to the instant claims as the instant rejection is not based on the "obvious to try" concept. The "obvious to try" concept implies in it's nature that the claimed invention might not work, however, in the instant case the prior art teaches that the invention will indeed work. The instant Application merely demonstrates an optimization of a known invention.

Applicant further asserts that the invention of the instant claims produces "unexpectedly good" results. However, the concept of unexpected results can only be demonstrated in relation to other results. In the instant case, the disclosed results have not been compared to any results other than the results of no treatment at all. Said results can not then reasonably be considered unexpected. The mere assertion of unexpected results is insufficient to support the claims.

3. Any inquiry concerning this communication or earlier communications from the examiner should be directed to Dr. Gerald Ewoldt whose telephone number is (703) 308-9805. The examiner can normally be reached Monday through Thursday and alternate Fridays from 7:30 am to 5:30 pm. A message may be left on the examiner's voice mail service. If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Christina Chan can be reached on (703) 308-3973. Any inquiry of a general nature or relating to the status of this application should be directed to the Technology Center 1600 receptionist whose telephone number is (703) 308-0196.

Papers related to this application may be submitted to Technology Center 1600 by facsimile transmission. Papers should be faxed to Technology Center 1600 via the PTO Fax Center located in Crystal Mall 1. The faxing of such papers must conform with the notice published in the Official Gazette, 1096 OG 30 (November 15, 1989). The CM1 Fax Center telephone number is (703) 305-3014.

G.R. Ewoldt, Ph.D.
Patent Examiner
Technology Center 1600
September 18, 2000


Patrick J. Nolan, Ph.D.
Primary Examiner
Technology Center 1600